NO. 41949-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DWAYNE WRIGHT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Roseanne Buckner

No. 10-1-02034-1

BRIEF OF RESPONDENT

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2. Whether the officers properly searched the vehicle and obtained the evidence pursuant to a valid warrant?

3. Whether sufficient admissible evidence supported the conviction?

4. Whether the defendant has failed to establish a claim of ineffective assistance of counsel?

5. Whether the court's sentencing condition directing the defendant to not have direct or indirect contact with drug users and sellers was reasonably related to the defendant's convictions and a lawful condition?

B. STATEMENT OF THE CASE.

1. Procedure

On May 12, 2010, based on an incident that occurred on March 5, 2010 the State charged the defendant with six counts: Count I, unlawful possession of a controlled substance with intent to deliver, methamphetamine; Count II, unlawful possession of a controlled substance with intent to deliver, marijuana; Count III, unlawful possession

of a controlled substance, heroin; Count IV, unlawful possession of a firearm in the second degree; Count V, driving while in suspended or revoked status in the third degree; Count VI, unlawful use of drug paraphernalia. CP 1-4. Counts I and II included a firearm sentence enhancement. CP 1-4.

On November 8, 2010 the defense filed a motion to suppress, claiming that the initial stop of the vehicle was pretextual. CP 7-26. On January 27, 2011 the State filed its response. CP 27-32.

On January 27, 2011 the State also filed an amended information that added school bus route stop sentence enhancements to counts I and II. CP 33-36.

On January 31, 2011 the defense filed a motion to dismiss the school bus route stop enhancements. CP 37-62.

On February 11, 2011 the case was assigned to the Honorable Judge Roseanne Buckner for trial. CP 245. On February 8, prior to trial, the court denied the motion to dismiss the school bus route stop enhancements. CP 246-57.

As part of trial with regard to his conviction for unlawful possession of a firearm, the defendant stipulated that he had previously been convicted of a felony. CP 131. A jury was empaneled. CP 258. The jury returned its verdicts, finding the defendant guilty as to Counts I, III, IV, V, and VI; and not guilty as to Count II. CP 182-189. The jury also found that the defendant was armed with a firearm when he

committed Count I. CP 190. The jury also found that the defendant committed Count I within 1,000 feet of a school bus rout stop. CP 192.

On March 25, 2011 the court sentenced the defendant to 204 months of incarceration. CP 216-229. The defendant timely filed a notice of appeal on March 31, 2011. CP 232.

2. Facts

a. Facts at Suppression Hearing

The court entered the following findings and conclusions on the suppression hearing. *See* CP 198-201.

THE UNDISPUTED FACTS

On or about March 5, 2010, at approximately 0115 hours, uniformed Pierce County Sheriff's Deputies Cooke and Shaw were on routine patrol in the 14700 block of Pacific Ave. S. in Tacoma, WA. They were driving a fully marked patrol car. Except for street lights and headlights, it was dark outside. At about that time, the deputies observed a vehicle traveling northbound. The deputies activated their patrol vehicle's emergency lights and conducted a traffic stop of the vehicle. The driver was the defendant and sole occupant of the vehicle.

Deputy Shaw approached the defendant's side of the vehicle, while Deputy Cooke approached the passenger side. From his vantage point outside of defendant's vehicle, Deputy Shaw observed what appeared to be a broken glass drug pipe with residue in a storage cubby-hole near the

steering wheel. Deputy Shaw immediately recognized it as drug paraphernalia.

Deputy Cooke contacted defendant from the passenger side of defendant's vehicle. From outside the vehicle, both deputies observed defendant's car keys lying on defendant's lap. One of the keys appeared to be shaved, a condition that allows a key to be used in a vehicle other than the one it was originally made for. Based on Deputy Cooke's training and experience, he believed the shaved key to be an automobile theft tool. Also from outside the vehicle, the deputies observed a lock box on the front passenger seat. Also from outside the vehicle, one of the deputies observed the defendant's iPhone in defendant's vehicle.

The defendant was placed under arrest. The deputies conducted a records check and discovered that the defendant's driver's status had been suspended in the 3rd degree. During a search incident to arrest, one of the deputies found another glass pipe used to smoke methamphetamine in the defendant's pocket, as well as approximately $565.

Neither Deputy Shaw nor Deputy Cooke searched the lock box or the trunk of the defendant's vehicle. Pierce County Deputy Nordstrom subsequently obtained a search warrant for the defendant's vehicle and contents, then searched the box and the trunk. In the box, Deputy Nordstrom found three separate quantities of methamphetamine, a quantity of black tar heroin, a digital scale, a loaded .40 caliber Smith&Wesson firearm and holster, at least one money order, and a letter

to the defendant from the Department of Licensing. In the trunk, Deputy Nordstrom found three separate bags of marijuana.

THE DISPUTED FACTS

1) Why did Deputies Cooke and Shaw stop the defendant's vehicle?

2) What, if anything, did Deputy Cooke observe on the screen of the defendant's i-Phone, and how did he observe it?

FINDINGS AS TO DISPUTED FACTS

1) The deputies effected a stop of the defendant's vehicle because it was not equipped with a license plate light as required by law.

2) Deputy Cooke observed a text message on the defendant's i-Phone screen that read, "if you still want to do the deal wit dem pills, call me." Deputy Cooke was able to see the screen from his vantage point outside the vehicle.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE.

All of the physical evidence is admissible. The deputy's stop of the defendant for a traffic infraction was not a pre-text to search the defendant or his vehicle for other reasons. The defendant committed a traffic infraction in front of the deputies, and that was their reason for stopping him.

The broken drug pipe and the shaved key were observed in open view, as the officers observed them from an unprotected area. The

deputies had probable cause to arrest the defendant for, at least, the drug paraphernalia and driving on a suspended license. That probable cause permitted the deputies to search the defendant incident to arrest, and thereby find the intact drug pipe and $565. Deputy Nordstrom's warrant was based upon probable cause and, therefore, his search of the vehicle and its contents was proper.

b. Facts at Trial

On March 5, 2010 Pierce County Sheriff's Deputy Robert Shaw and his partner Deputy Cooke conducted a traffic stop of a vehicle at about 1:15 in the morning. II RP p. 203, ln. 20 to p. 204, ln. 1. The officers stopped the vehicle because it did not have a license plate light. II RP 204, ln. 4-6. The officers approached the vehicle and observed one occupant, the defendant. II RP 209, ln. 3-13. In a fold-down type of cubby hole located between the steering wheel and the dash board, Deputy Shaw observed a broken length of glass pipe of the type used to smoke controlled substances. II RP 210, ln. 10-14. The defendant saw where Deputy Shaw was looking and as he was looking for documents, the defendant reached up and tried to close the compartment. II RP 210, ln. 15-19.

Deputy Shaw observed that the defendant had his keys sitting in his lap and noticed that one of them appeared to be a shaved key, which is commonly used to break into and steal vehicles. II RP 211, ln. 15-21.

While he was outside the car, Deputy Cooke observed a phone in the passenger areas of the car and could read a text message on the screen. III RP 269, ln. 1-12. The message said, "If you still want to do the deal with dem pills, call me." III RP 270, ln. 1-2.

The officers had the defendant step out of the vehicle and arrested him for the drug paraphernalia and auto theft tools. II RP 212, 18-22; p. 213, ln. 5-6. The deputies searched the defendant's person incident to his arrest. II RP 213, ln. 6. The deputies found a glass pipe commonly used to smoke methamphetamine in the defendant's pockets, as well as a total of $565 in cash. II RP 213, ln. 9-16. The money was folded or bundled into smaller clumps or groupings, consistent with having been received in successive drug sales. II RP 213, ln. 17-25.

Officers also observed a lock box sitting in a cardboard box in the passenger seat of the vehicle. III RP 238, ln. 6-8; p. 261, ln. 5.

A records check revealed that the defendant's driving status was suspended in the third degree. II RP 219, ln. 15-25.

A Puyallup Police Officer was called in with his narcotics K-9, and the dog alerted positive on the vehicle. II RP 220, ln. 21 to p. 221, ln. 3.

The vehicle was impounded and taken to the South Hill precinct to await application for a search warrant. III RP 236, ln. 22-24.

Deputy Nordstrom later obtained a search warrant for the vehicle. III RP 296, ln. 14-21. Inside the vehicle he found the lockbox on the passenger seat. III RP 299, ln. 19-22. Deputy Nordstrom used a

screwdriver to pry the lock open. III RP 300, ln. 1. Inside the box he found a digital gram scale, two separate baggies of methamphetamine and a plastic thing that had larger shards of methamphetamine, heroin, money gram receipts in the name of Dwayne Wright, and a Smith and Wesson .40 caliber pistol. III RP 300, ln. 15-17; p. 303, ln. 5-9; p. 304, ln. 12-17; p. 305, ln. 13-23; p. 311, ln. 9-15. Digital gram scales are used for weighing street level drugs as part of transactions. III RP 302, ln. 19-25.

Three bags of marijuana were found in the trunk of the car. III RP 336, ln. 9-17.

Deputy Nordstrom also used a measuring wheel to measure the distance to school bus route stops near where the defendant had traveled. III RP 342, ln. 17-18. He measured a school bus route stop within 737 feet of the defendant's location. III RP 350, ln. 7.

C. ARGUMENT.

1. WRIGHT MAY NOT RAISE SUPPRESSION CHALLENGES FOR THE FIRST TIME ON APPEAL WHERE THE ALLEGED ERRORS DO NOT RISE TO THE LEVEL OF A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT.

The defense attempts to rely on RAP 2.5(a)(3) to circumvent the long established standard in Washington (which also exists under federal law) that a suppression issue may not be raised for the first time on appeal.

Because it disregards the long established law of Washington, the claim is wholly lacking in merit and should be denied.

RAP 2.5 provides: provides in pertinent part:

> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ...(3) manifest error affecting a constitutional right. ...

The court in ***State v. Valladares*** specifically clarified the scope of the exception under RAP 2.5(a)(3) because it was being misconstrued and had been "misread with increasing regularity." ***State v. Valladares***, 31 Wn. App. 63, 75, 639 P.2d 813 (1982), *rev'd. in part on other grounds*, ***State v. Valladares***, 99 Wn.2d 663, 664 P.2d 508 (1982). RAP 2.5(a)(3) is a limited exception to the general rule that issues may not be raised for the first time on appeal. ***Valladares***, 31 Wn. App. at 75.

The court in ***Valladares*** went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible, the admission of that evidence was not a clear violation of the defendant's due process rights, and was therefore not a manifest constitutional error that could be raised for the first time on appeal. ***Valladares***, 31 Wn. App. at 76 (citing ***State v. Baxter***, 68 Wn.2d 416, 422-23, 413 P.2d 638 (1966)). ***Valladares*** appealed to the Washington Supreme Court, which agreed with and affirmed the Court of Appeal's analysis on the issue of waiver.

See ***Valladares***, 99 Wn.2d, at 671-72. The Supreme Court held that by, "withdrawing his motion to suppress the evidence, ***Valladares*** elected not to take advantage of the mechanism provided for him for excluding the evidence," and thus waived or abandoned his objections. ***Valladares***, 99 Wn.2d at 672. *See also* ***State v. Robinson***, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011).

Only six years after the Court of Appeals in ***Valladares*** felt the need to clarify "manifest error," in ***State v. Scott***, the Supreme Court again felt the need to clarify the construction to be given to the "manifest error standard." ***State v. Scott***, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In ***Scott***, the court held that the proper approach to claims of constitutional error asserted for the first time on appeal is that '[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by "manifest;"' and second, "[i]f the claim is constitutional then the court should examine the effect the error had on the defendant's trial according to the harmless error standard. [...]" ***Scott***, 110 Wn.2d at 688.

The standard set forth in ***Scott*** has subsequently been elaborated into a four-part analysis.

> First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must

> determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.
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> ***State v. Bland***, 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).

Moreover, under RAP 2.5(a)(3), while an appellant can raise a manifest error affecting a constitutional error for the first time on appeal, appellate review of the issue is not mandated if the facts necessary for a decision cannot be found in the record, because in such circumstances the error is not "manifest." ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing ***State v. Riley***, 121 Wn.2d 22, 846 P.2d 1365 (1993)).

Here, the defense cannot challenge the evidence for the first time on appeal for two reasons: First, although suppression challenges may implicate or be based on violations of constitutional rights, suppression challenges themselves are not a constitutional right and do not fall under RAP 2.5(a)(3); Second, the record has not been adequately developed to permit review of the issues.

a. The Suppression Of Evidence Is Not A Constitutional Right That Falls Under RAP 2.5(a)(3).

It is long and well established under both the State and Federal constitutions that if an objection to evidence that was allegedly obtained illegally is not asserted timely, it is waived. *See* ***State v. Gunkel***, 188 Wash. 528, 535-36, 63 P.2d 376 (1936); ***State v. Baxter***, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); ***State v. Duckett***, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968). Where a defendant fails to assert a suppression issue at the trial court level, the defendant has waived that argument and may not raise the issue for the first time on appeal. ***State v. Mierz***, 127 Wn.2d 460 468, 901 P.2d 286 (1995); *See also* ***State v. Silvers***, 70 Wn.2d 430, 432, 423 P.2d 539 (1967), *cert. denied*, 389 U.S. 871 (1967). The issue is also waived where a defendant raises a suppression issue at the trial court, but fails to pursue the issue. ***State v. Massey***, 60 Wn. App. 131, 803 P.2d 340 (1991).

At the trial court level, the suppression motion must be raised in a timely manner and the court has authority to reject suppression motions that were not made prior to the start of trial. *See* CrR 4.5(d). CrR 3.6 was adopted in 1975 and specifically governs motions to suppress evidence. Under CrR 3.6 the defendant has the burden of requesting a hearing on suppression issues. ***State v. Gould***, 58 Wn. App. 175, 185, 791 P.2d 569 (1990).

CrR 3.6 motions to suppress evidence are heard prior to the time the case is called for trial. *See* Ferguson, 12 & 13 Washington Practice: Criminal Practice and Procedure, Chap. 23 (3d Ed) (citing CrR 4.5(d)); Tegland, 4A Washington Practice Rules Practice, CrR 3.6. Such a standard is implicit in the language of CrR 3.6 where the rule requires the moving party to set forth in a declaration the facts the party expects to be elicited in the event there is an evidentiary hearing. CrR 3.6(a). A pre-trial hearing is further implicated by the rule's language that based upon the pleadings the court is to determine whether an evidentiary hearing is required. CrR 3.6(b). All of this implicitly requires a pre-trial hearing. The requirement of a pre-trial hearing is also consistent with the legal standards in Washington prior to the adoption of rule CrR 3.6. ***State v. Simms***, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973) (citing ***State v. Baxter***, 68 Wn.2d 416, 422, 413 P.2d 638 (1966); ***State v. Robbins***, 37 Wn.2d 431, 224 P.2d 345 (1950)). Moreover, nothing in CrR 3.6 permits or contemplates successive suppression motions.

The interpretation of CrR 3.6 as requiring pre-trial suppression motions is also consistent with CrR 4.5(d), which governs omnibus hearings.

> **(d) Motions.** All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. [....].

Waiver for failure to raise the issue before the trial court applies to suppression motions even where the claimed issue is a constitutional one and the there is a reasonable possibility the motion to suppress would have been successful if the issue had been raised. ***State v. Tarica***, 59 Wn. App. 368, 372, 798 P.2d 296 (1990); *See also* ***State v. Valladares***, 31 Wn. App. 63, 639 P.2d 813 (1982), *rev'd. in part on other grounds*, ***State v. Valladares***, 99 Wn.2d 663, 664 P.2d 508 (1982). This is because the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not raised is not an error in the proceedings below. *See* ***Tarica***, 59 Wn. App. at 372 (citing ***State v. Baxter***, 68 Wn.2d 416, 413 P.2d 638 (1966)). In ***State v. Baxter***, the court held that the defendant's motion to suppress evidence at the end of the State's case was too late where the defendant was well aware of the circumstances of his arrest at the time the allegedly unlawful evidence was entered. ***Baxter***, 68 Wn.2d at 416.

RAP 2.5(a)(3) provides that the court may refuse to review any claim of error which was not raised at the trial court, however the party may raise for the first time a manifest error affecting a constitutional right.

In ***State v. Valladares***, the court held that where a defendant raised and then later withdrew a suppression issue that it could not be raised for the first time on appeal under RAP 2.5(a)(3) because the rule's discussion of manifest constitutional error contemplates a trial error involving due

process rights, as opposed to pre-trial rights. ***Valladares***, 31 Wn. App. at 75-76.

The alleged failure to raise a suppression issue below can be contrasted with a genuine constitutional violation that properly does fall under RAP 2.5(a)(3). For example, in ***State v. Kitchen***, the court did consider a constitutional issue raised for the first time [in a reply brief] where that issue related to the right to a unanimous jury verdict. ***State v. Kitchen***, 46 Wn. App. 232, 730 P.2d 103 (1986), *affirmed*, 110 Wn.2d 403, 756 P.2d 18 (1982).

Because the alleged failure to raise a suppression involves pre-trial rights, and does normally implicate a trial error involving due process rights, the suppression issue raised here does not fall under RAP 2.5(a)(3) and therefore may not be raised for the first time on appeal.

b. <u>The Record Is Not Sufficient To Permit Review For The First Time On Appeal.</u>

Wright did not directly challenge the search of the vehicle below. Instead, his suppression challenge was based on a claim that when the deputies stopped him it was unlawful because it was pretextual. The trial court rejected Wrights claim, finding instead that Wright was stopped for the infraction of no license plate light and that the stop was not pretextual. CP 200-201.

The record of the suppression hearing was fairly well developed with regard to showing what evidence flowed from the claimed pretextual stop. However for purposes of this review the record is not complete, particularly with regard to the details of the bases and of the arrest, as well as the application of the K-9 drug dog to the vehicle. Because the State was not put on notice of those issues and the record on them was not adequately developed with regard to them, the record is now insufficient to support review of the defendant's claim for the first time on appeal.

As a preliminary matter it should be noted that the defense assigned error to the trial court's determination that Deputy Nordstrom's warrant was based on probable cause. Br. App. 1 (Assignment of Error 8). However there is no assignment of error to the court's factual findings, and specifically no claim that they were not supported by sufficient evidence. *See* Br. App. 1. Accordingly, the trial court's findings are now verities on appeal. ***State v. Hill***, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994); ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The record from the suppression hearing indicates that the cubby with the broken methamphetamine pipe was left of the steering wheel, between it and the driver's door. I RP 17, ln. 4-9; p. 40, ln. 3-6.

There was a metal lock box on the passenger seat. I RP 38, ln. 2-3. The officers had Wright get out of the vehicle and placed in handcuffs based on the drug paraphernalia and auto theft tools. I RP 19, ln. 9-10; p. 40, ln. 10-12. Deputy Cook subsequently performed a records check

which revealed that Wright's license to drive was suspended. I RP 40, ln. 12-14.

Wright was arrested for driving on a suspended license, drug paraphernalia, auto theft tools, and possibly for possession of methamphetamine for the substance that was in the pipe. I RP 41, ln. 24 to p. 19, ln. 16-18; p. 42, ln. 3. Clearly, the latter basis did not occur until after the defendant was searched incident to arrest, so the record is ambiguous as to whether the arrest on the suspended license occurred before or after the officers had searched his person. In the undisputed facts section of the court's findings and conclusions the statement that the defendant was placed under arrest occurs before the statement regarding the records check and Wright's suspended license. CP 199. But it is unclear whether that is the order the two occurred in. *See also* I RP 19, ln. 9-10. Further, the discovery that Wright's license was suspended is referred to again separately further down the same page, suggesting the order of the undisputed facts was not necessarily chronological. CP 199.

In a search of Wright's person incident to his arrest the deputies found a glass smoking pipe in Wright's pocket, which had a significant amount of crystalline residue that field-tested positive for methamphetamine. I RP 40, ln. 14-19.

Wright also had a significant amount of cash on his person, was not quite sure of the denominations, and was a couple of hundred dollars off as to the total amount of cash he had. I RP 21, ln. 5-6; p. 40, ln. 20-23.

The cash was also not folded together, but was in a number of separate smaller bundles as is commonly seen with drug-related transactions. I RP 21, ln. 8-12; p. 40, ln. 23 to p. 41, ln. 6.

Before the deputies impounded the car, they had a narcotics K-9 respond to the scene and have his dog sniff on the vehicle. III RP 270, ln. 12-19. The dog hit on the vehicle, indicating that there were narcotics in the vehicle or had been in the vehicle. I RP 21, ln. 15-23. The dog had a couple of strong indications in the area of the cubby near the steering wheel that had contained the pipe, as well as in the area of the lockbox that was observed on the passenger seat. I RP 41, ln. 7-14. It appears that at least some of the K-9 alert was from outside the vehicle, however, it is unclear if the dog actually entered the vehicle. *See* II RP 221, ln. 4-5.

The vehicle was impounded for purposes of obtaining a search warrant. I RP 21, ln. 24-25; p. 42, ln. 4-5. Both officers participated in the inventory of the contents of the vehicle. I RP 49, ln. 2-4. However, no further testimony was developed as to what the officers observed as a result of the inventory pursuant to impound.[1]

The officers removed the broken glass pipe from the compartment between the steering wheel and the door, however, it is unclear if that was done as a search of the vehicle incident to the arrest of the defendant or if

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[1] Presumably they would have observed the glass pipe in the cubby again, although the record is silent on that issue.

it was as part of the inventory of the vehicle. II RP 214, ln. 24 to p. 215, ln. 4.

Here, for several reasons the record is insufficient to permit review of the defense claim that the narcotics dog was unlawfully applied to the vehicle. First, there is nothing to indicate that the canine was admitted to the interior of the vehicle. If the vehicle door had been left open by Wright when he got out and was therefore open at the time the canine was applied, the canine could have alerted on the area of the cubby with the drug pipe from the area of an open door, without entering into the vehicle or violating Wright's expectation of privacy. The canine may have similarly been able to alert toward the lock box from an open doorway as well.

In addition to being silent as to how the canine was applied to the vehicle, the record is also silent as to why the canine was applied to the vehicle. As a result, the court is unable to determine if it was done under some other exception to the warrant requirement.

Further, here the officers conducted an inventory search of the vehicle. It is unclear whether a search of the vehicle incident to arrest was also conducted, and if so, whether or not it was simultaneous to the inventory search, or something separate.

Given that the record is silent with regard to the aforementioned facts, it is inadequate to determine whether or not the application of the narcotics canine was lawful. Where the record is inadequate to determine

the issue, the defendant is not entitled to raise the matter for the first time on appeal.

Moreover, additional issues that relate to the adequacy of the record to support review of the defendant's claim on appeal are addressed in section 2.b below, specifically with regard to the lack of a *quasi-**Franks*** hearing in the trial court.

c. The Defense Argument Contradicts Itself.

The defense argument is internally contradictory in a way that is fatal to the defense position. The defense argues that under a modern interpretation of RAP 2.5(a)(3) the analysis related to consideration of issues raised for the first time on appeal is no longer one of preclusion, but rather one of whether there is an adequate record to support review of issues that are constitutional and sufficiently prejudiced the defendant. Br. App. 13 to 33. In furtherance of this view the defense goes on to argue at the end that in Lee the court of appeals interpreted ***State v. Robinson*** in an overly broad manner. Br. App. 30 (citing ***State v. Lee***, 162 Wn. App. 852, 259 P.3d 294 (2011)); and ***Robinson***, 171 Wn.2d 292.

In its argument the defense acknowledges that the court in ***Robinson*** adopted a four-part test to determine whether principles of issue preservation apply. Br. App. 31-32. What the defense fails to recognize is that where the court in ***Robinson*** recognized issue preservation as an issue with regard to RAP 2.5, it directly contradicts the defense argument that

issue preservation has been superceded by RAP 2.5. *See* ***Robinson***, 171 Wn.2d at 304ff.

The defense attempts to argue that the application of issue preservation in ***Robinson*** is narrowly limited to situations where there has been a significant change in the law. Br. App. 31-32. But the fact that issue preservation applies at all gives the lie to the defense argument that a modern reading of RAP 2.5 no longer involves issue preservation. Moreover, the defense argument mischaracterizes the ***Robinson*** court's treatment of issue preservation. Issue preservation is the baseline purpose for RAP 2.5(a), with the ***Robinson*** court noting that the exception it crafted to issue preservation applied only to a narrow class of cases where there has been a significant change in the law so that the challenge was specifically foreclosed. *See* ***Robinson***, 171 Wn.2d at 304-05.

What the defense argument attempts to do is invite the court of appeals to go on a frolic and detour of its own that is directly contrary to the standards repeatedly affirmed by the Supreme Court with regard to RAP 2.5. That is an invitation this court should decline.

The court should reject the argument that the suppression issues may be raised for the first time on appeal where the exception crafted in ***Robinson*** does not apply because there has not been a significant change in the law such that Wright was foreclosed from raising his suppression challenge below.

2. THE OFFICERS PROPERLY SEARCHED THE VEHICLE PURSUANT TO A VALID WARRANT.

a. The Warrant Was Valid Where It Was Supported By Probable Cause.

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. ***State v. Fisher***, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). *See also* ***State v. Young***, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) ("Generally, the probable cause determination of the issuing judge is given great deference."); ***State v. J-R Distribs., Inc.,*** 111 Wn.2d 764, 774, 765 P.2d 281 (1988) ("[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant."]. Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. ***State v. Feeman***, 47 Wn. App. 870, 737 P.2d 704 (1987). The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. ***State v. Yokley***, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); ***State v. Helmka***, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Doubts are to be resolved in favor of the warrant. ***State v. Casto***, 39 Wn. App. 229, 232,

692 P.2d 890 (1984) (citing ***State v. Partin***, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)).

> [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967)(quoting, with approval from ***United States v. Ventresca***, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

In reviewing probable cause the court looks to the four corners of the search warrant itself. Probable cause to search is established if the affidavit in support of the warrant sets forth facts sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. ***State v. Maxwell***, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Here the warrant is supported by probable cause. *See* CP 21. The declaration indicates that Deputy Shaw observed the broken glass pipe in

the vehicle cubby, and that Wright sought to hide it and then claimed it wasn't his. The declaration also indicates that the deputies observed the shaved key. Upon the arrest of Wright, officers discovered a glass narcotics smoking pipe that contained residue in his pocket. That pipe contained a significant amount of white crystalline substance that field tested positive for methamphetamine.

The shaved key and the pipe found in Wright's pocket were alone sufficient to support probable cause for the search warrant.[2] This is particularly so where the declaration also indicates that Wright has prior convictions for controlled substance violations, as well as possession of burglary tools. CP 21-22.

Probable cause supported the warrant.

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[2] The State does not concede that the application of the canine to Wright's vehicle was unlawful. As argued in section 2.b and 2.c below, the defense is not entitled to raise that issue. Moreover, as argued in section 1.b. above, the application of the canine may have been lawful, however the record is not sufficient to make a determination. Nonetheless, the State conducts the probable cause analysis of the warrant without the benefit of the canine alerts for the sake of argument only because the canine results are not necessary to support probable cause for the warrant. That probable cause is only further reinforced by the results of the canine alterts.

b. The Defense Cannot Now Challenge The Basis For Probable Cause In The Warrant Where It Failed To Request A *Quasi-**Franks*** Hearing Below.

Generally, the "four corners rule" does not permit challenges to facially valid affidavits establishing probable cause for warrants. *See* ***State v. Moore***, 54 Wn. App. 211, 214, 773 P.2d 96 (1989) (citing ***U.S. v. Bowling***, 351 F.2d 236, 241-42 (6th Cir. 1965)). However, ***Franks v. Delaware*** established a procedure for challenging parts of a warrant that are predicated on an affiant's deliberate falsehoods or statements made with deliberate disregard for the truth. *See* ***State v. Garrison***, 118 Wn.2d 870, 827 P.2d 1388 (1992); and ***Moore***, 54 Wn. App. at 214 (both citing ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). The ***Franks*** hearing was instituted to detect and deter the issuance of warrants based on information gathered as a result of governmental misconduct. ***Moore***, 54 Wn. App. at 214-15 (citing ***Thetford***, 109 Wn.2d at 399). Under the ***Franks*** procedure, a defendant is only entitled to an evidentiary hearing if the defendant first makes a "substantial preliminary showing" that an officer or agent of the State knowingly or recklessly made a statement that was the basis of a court's probable cause finding. ***Moore***, 54 Wn. App. at 214 (***State v. Thetford***, 109 Wn.2d 392, 398, 745 P.2d 496 (1987) and ***Franks***, 438 U.S. at 155).

Washington has followed the federal standard, and a defendant must show either a material falsehood or a material omission of fact by the officer. ***State v. Chenoweth***, 160 Wn.2d 454, 465, 158 P.3d 595 (2007) (rejecting the argument that Article I, Section 7 of the Washington Constitution demands a standard of mere negligence). Intentional omissions or misstatements occur when the affiant shows "reckless" disregard for the truth. Recklessness is shown where the affiant, "in fact entertained serious doubts as to the truth of the facts or statements in the affidavit." ***State v. O'Connor***, 39 Wn. App. 113, 117, 692 P.2d 208 (1984), quoting ***U.S. v. Davis***, 617 F.2d 677, 694 (D.C.Cir. 1979).

> "[S]uch serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

O'Connor, 39 Wn. App. at 117.

A defendant has the burden of proving by a preponderance of the evidence that there was an intentional misrepresentation or a reckless disregard for the truth by the affiant. ***State v. Hashman***, 46 Wn. App. 211, 729 P.2d 651 (1986); ***State v. Stephens,*** 37 Wn. App. 76, 678 P.2d 832 (1984). Even if a defendant were able to prove an intentional or reckless misstatement or omission, he still would be required to show that probable cause to issue the warrant would not have been found had those

false statements been deleted and the omissions included. ***State v. Gentry***, 125 Wn.2d 570, 607, 888 P.2d 1105 (1995).

Courts have applied a similar approach to claims that a warrant is based upon illegally obtained information. *See* ***State v. McReynolds***, 117 Wn. App. 309, 330-331, 71 P.3d 663 (2003); ***State v. Coates***, 107 Wn.2d 882, 735 P.2d 64 (1987). In ***State v. McReynolds***, the court ruled the trial court did not err when it conducted a ***Franks*** hearing and suppressed a series of four warrants because they were tainted by unlawfully obtained evidence, but upheld a fifth warrant because the trial court found that the fifth warrant was not tainted by the illegally obtained evidence. ***McReynolds***, 117 Wn. App. 330-31. Similarly, in ***State v. Coates***, the court held that a warrant was valid and affirmed the defendant's conviction where a defendant's illegally obtained statement was included in the probable cause statement for the warrant. ***Coates***, 107 Wn.2d at 886-88.

As the court in ***Coates*** noted, the procedure for review of a warrant containing illegally obtained evidence, is to strike any information from the warrant that is illegally obtained and review the affidavit to determine whether probable cause still exists without the struck material. ***Coates***, 107 Wn.2d at 888. Moreover, the court in ***State v. Thompson*** cited ***Coates*** with approval for precisely this proposition. ***State v. Thompson***,

151 Wn.2d 793, 807-808, 92 P.3d 228 (2004) (citing ***Coates***, 107 Wn.2d at 888).

c. The Application Of The Drug Dog To The Interior Of The Vehicle Was Appropriate Where The Officers Were Searching For Evidence Of The Crimes Of Arrest.

The Gant decision specifically allowed for warrantless searches for evidence of the crime of arrest. ***Arizona v. Gant***, 556 U.S. 332, 343-44, 129 S. Ct. 1710 (2009). Washington appellate cases have similarly applied this exception. *See* ***State v. Snapp***, 153 Wn. App. 85, 495, 219 P.3d 971 (2009), *review granted*, 169 Wn.2d 1026, 241 P.3d 413 (2010) ***State v. Wright***, 155 Wn. App. 537, 230 P.3d 1063 (2010), *review granted*, 169 Wn.2d 1026, 241 P.3d 413 (2010). ***Snapp*** and ***Wright*** were consolidated at the Supreme Court and oral argument was held March 19, 2010. *See* ***State v. Snapp***, No. 84223-0 and ***State v. Wright***, No. 84569-7.

Under the evidence of the crime of arrest exception, the officers were entitled to search the interior of Wright's car without a warrant for evidence related to the crime of possession of auto theft tools, as well as for the crime of drug paraphernalia. The officers were entitled to search the vehicle for evidence of the crime of drug paraphernalia for both the pipe observed in the vehicle cubby, as well as the pipe found on Wright's person. Accordingly, this claim is without merit and should be denied.

d. The Defendant's Arrest For Drug Paraphernalia Was Lawful.

The defendant claims that the deputies arrested the defendant for the non-existent crime of possession of drug paraphernalia and cites to I RP 19, 40 in support of that proposition. *See* I RP 19, ln.; p. 40, ln. 10-12.

The defense is correct that the statute prohibits the unlawful use of drug paraphernalia makes it unlawful for any person to:

> ...use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

[Emphasis added.]

Here, the officers had probable cause to believe that each pipe was being used to store or contain a controlled substance. The deputies observed that there appeared to be residue or something in the pipe in the vehicle cubby. II RP 171, ln. 22 to p. 172, ln. 2. Additionally, the pipe found on Wright's person stored or contained enough methamphetamine that it could be collected from the pipe and field-tested. III RP 266, ln. 3-7.

Additionally, Pierce County Code 9.56.020(A) provides

> It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process,

> prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

Violation of this provision may be an infraction or misdemeanor depending up on the circumstances. PCC 9.56.030. The Tacoma Municipal Code has a similar provision that makes it a misdemeanor to possess with intent to use drug paraphernalia. *See* TMC 8.29.060. Although it appears likely this crime occurred outside the Tacoma city limits, that is not completely clear from the record.

The broken pipe found in the vehicle cubby had a burnt residue. III RP 284, ln. 7-10. When he observed the pipe through Wright's window, Deputy Shaw could see that there appeared to be residue or something in the pipe, and that the pipe was commonly used to smoke narcotics. II RP 171, ln. 22 to p. 172, ln. 2.

The pipe found on Wright's person had a more significant quantity of residue that indicated to the deputy that someone had loaded the pipe, smoked some of the substance, but not all of it and there was enough for him to scrape a piece out and test it. III RP 266, ln. 3-7.

The defense claims that the fact that Wright was booked for drug paraphernalia must be excised from the warrant. Based on the preceding facts, the State disagrees with that argument. However, even if the arrest for drug paraphernalia were excluded, Deputy Shaw's observations of the pipe with apparent residue in the cubby, as well as the pipe on Wright's

person that contained residue that tested positive for methamphetamine would remain in the warrant declaration even if the arrest for paraphernalia were excluded.

The relevant issue here is whether or not the officer's observations of drug paraphernalia contributed to establishing probable cause to support the warrant. Whether or not Wright was lawfully arrested on the paraphernalia charge is irrelevant to the observations of paraphernalia that contributed to probable cause in support of the warrant.

In either case, probable cause related to the unlawful use of drug paraphernalia existed via the observations of the officers and supported the warrant. Accordingly, the defendant's claim on this issue should be denied, even if it could be raised for the first time on appeal. Moreover, where the defendant failed to request a *quasi-**Franks*** hearing below, he cannot now avoid his burden to make a preliminary showing and simultaneously deprive the State of the opportunity to rebut that showing if made.

The defendant's claim on this issue should be denied as without merit.

3. SUFFICIENT ADMISSIBLE EVIDENCE SUPPORTED THE CONVICTION.

The defense claims that the State did not present sufficient evidence to support the conviction of Wright for Counts I, III and IV. Br. App. 47.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> [...]great deference [. . .] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

Here, the defense challenges Wright's convictions for Counts I, unlawful possession of a controlled substance with intent to deliver (methamphetamine); Count III, unlawful possession of a controlled

substance (heroin); and Count IV, unlawful possession of a firearm. Br. App. 47ff. *See also* CP 182-192.

More specifically, the defense argues that based upon their claim that probable cause did not support the warrant, if the evidence were to be suppressed, there would be insufficient evidence to support the convictions as to Counts I, III, and IV. However, because probable cause supported the warrant as argued in section 2 above, the evidence was properly admitted at trial and sufficient evidence supported the convictions.

4. THE DEFENDANT FAILS TO ESTABLISH A CLAIM INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL WAS EFFECTIVE.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial

record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. ***McFarland***, 127 Wn.2d at 333-34; ***Riley***, 121 Wn.2d 22.

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating

counsel's strategic decisions." ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting ***McNeal***, 145 Wn.2d at 362).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. ***McFarland***, 127 Wn.2d at 338 n. 5. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. ***McFarland***, 127 Wn.2d at 334.

Here, Wright cannot show that counsel's failure to challenge the warrant and the evidence obtained therefrom was deficient. As the State argues in section 2 above, probable cause supported the warrant. Even if trial counsel had successfully challenged the application of the canine to Wright's vehicle, the warrant was still supported by probable cause independent of that violation. Accordingly, trial counsel's decision not to challenge the warrant was a reasonable tactical decision where it would have been a waste of time. Moreover, Wright can show no harm from counsel's failure to challenge the warrant because had counsel done so, he would not have obtained any relief.

The defense claims that Wright's arrest was unlawful. However, the defense does not challenge wrights arrest for possession of the auto

theft tool (shaved key), which serves as an independent basis for his arrest. Moreover, Wright was also arrested for his suspended license. The lawfulness of Wright's arrest, *vel non* does not affect the officers observations that provided additional probable cause to support the warrant.

For all these reasons, Wrights claim of ineffective assistance of counsel fails and should be denied.

5. THE COURT'S SENTENCE CONDITION PROHIBITING ASSOCIATION WITH DRUG USERS AND SELLERS IS A REASONABLE CONDITION RELATED TO WRIGHT'S CONVICTIONS AND DOES NOT VIOLATE HIS FREEDOM OF ASSOCIATION.

Where Wright was convicted of possession of a controlled substance with intent to deliver, as well as possession of a controlled substance, the prohibition against having contact with drug users or sellers is sufficiently crime related and reasonable.

The fact that the prohibition purportedly impacts freedom of association is a red herring, as the prohibition is reasonably necessary to prevent Wright's future repeat of the same crime.

The defense's true objection to this crime related prohibition appears to be that it is ambiguous because Wright has no way of knowing if persons he meets are drug users or sellers. Br. App. 55. The defense

provides no authority in support of that argument. Accordingly, this court should decline to consider it.

Where a defendant fails to support an argument with citation to relevant authority or to relevant facts in the record, the court will not consider the issue. *See* ***Spradlin Rock Products, Inc. v. Public Utility District No. 1***, 164 Wn. App. 641, 667, 226 P.3d 229 (2011); ***Ensley v. Pitcher***, 152 Wn. App. 891, 906 n. 12, 222 P.3d 99 (2009) (citing RAP 10.3(a)(6)); ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***Smith v. State***, 135 Wn. App. 259, 270 n. 11, 144 P.3d 331 (2006).

Further, "'Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" ***Spradlin Rock Products, Inc.***, 164 Wn. App. at 667 (quoting ***Holland v. City of Tacoma***, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

The freedom of association protects certain intimate human relationships, such as those that attend the creation and sustenance of a family, and the right to associate for the purpose of engaging in those activities protected by First Amendment including speech, assembly, petition for the redress of grievances, and the exercise of religion. ***Roberts v. United States Jaycees***, 468 U.S. 609, 617-19, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Generally, only relationships of this type are likely to

reflect the understanding of freedom of association as an intrinsic element of personal liberty. ***Roberts***, 468 U.S. at 620. There is no right of general association under the First Amendment. ***City of Dallas v. Stanglin***, 490 U.S. 19, 19 S. Ct. 1591, 104 L. Ed. 2d 18 (1989). The defendant's assertion of a general right of association does not fall within the fundamental right protected by the constitution.

Even assuming for the sake of argument that it did, the defendant is not entitled to relief. The court has emphasized that as to the reasonable necessity requirement, the interplay of fundamental rights and sentencing conditions is fact specific and not susceptible to bright-line rules. ***In re Rainey***, 168 Wn.2d 367, 377-78, 229 P.3d 686 (2010). That case involved the fundamental right to parent. ***Rainey***, 168 Wn.2d at 377.

At least one case has noted that the court may not abdicate its responsibility for setting conditions of release by leaving it to the probation officer to define pornography for purposes of the sentencing condition. *See* ***State v. Sansone***, 127 Wn. App. 630, 11 P.3d 1251 (2005). A challenge that a probation condition is ambiguous is evaluated under a vagueness standard. *See* ***Sansone***, 127 Wn. App. at 642 (citing ***United States. v. Loy***, 237 F.3d 251 (3rd Cir. 2001)). Here the court has not abdicated any responsibility to the probation officer.

Even if the language here initially appeared ambiguous to a degree that violated the freedom of association, it would still be

susceptible to a limiting construction that would save it. Statutes or ordinances will only be overturned as overbroad in violation of the First Amendment only if the court is unable to place a sufficiently limiting construction on the statutory language. ***State v. Immelt***, 173 Wn.2d 1, 267 P.3d 305, 307 (2011). Because of the dearth of cases addressing vagueness challenges to sentence conditions, the State was unable to locate any Washington law on this issue. However, presumably the same standard would apply to sentencing conditions. If so, the court could simply construe the condition to prohibit Wright from having contact with persons that he knows or reasonably should know are drug users or sellers, etc.

Finally, even if the defendant were entitled to relief on this claim, the only relief to which he would be entitled would be a remand to the trial court to correct the condition to reflect that it be limited to prohibiting the defendant from associating with those person he knows or reasonably should know are drug users or sellers, etc.

The defendant's claim on this issue should be denied as without merit.

D. CONCLUSION.

The defendant is precluded from raising a suppression challenge for the first time on appeal where a challenge to the admission of evidence is not a constitutional right and this case does not fall under an exception

to the bar in RAP 2.5(a)(3). Even if the defendant's challenge could be raised under RAP 2.5(a)(3), the defendant is not entitled to relief where the record is not adequate to review what evidence that supported probable cause for the search warrant to issue was or was not lawfully obtained.

DATED: February 13, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Stephen Trinen by K. Roche
STEPHEN D. TRINEN 14811
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service: email
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/13/12 C Johnson
Date Signature

Appendix A

Pierce County Code
on
Drug Paraphernalia

Chapter 9.56

DRUG PARAPHERNALIA

Sections:

9.56.010 Definitions.

As used in this Chapter, the following terms shall mean the following:

A. "Business" means any location, whether indoors or outdoors, at which merchandise is offered for sale.

B. "Controlled substance" means those controlled substances set forth in the Revised Code of Washington (RCW 69.50) or the United States Code (at 21 USC Sections 801-971) as such now exist or may hereafter be amended.

C. "Display" means to show to a patron or to place in a manner so as to be available for viewing or inspection by a patron.

D. "Distribute" means to transfer ownership or a possessory interest to another, whether for consideration, as a gratuity or gift, for consignment, or otherwise.

E. "Drug paraphernalia" means any of the following:

1. Any item, whether useful for non-drug-related purposes or not, which is displayed, grouped with other items, advertised, or promoted in a manner to reasonably suggest its usefulness in the growing, harvesting, processing, manufacturing, preserving, inhaling, injecting, or ingesting of marijuana, hashish, cocaine, methamphetamine, or any controlled substance.
2. Any item, whether useful for non-drug-related purposes or not, which is designed, decorated, adorned, packaged, or displayed in a manner to reasonably suggest its usefulness in the growing, harvesting, processing, inhaling, injecting, or ingesting of marijuana, hashish, cocaine, methamphetamine, or any controlled substance.
3. Any item defined by any statute of the state of Washington as drug paraphernalia (RCW 69.50) or by any statute of the United States Code (at 21 USC Sections 801-971) as drug paraphernalia.
4. The term "drug paraphernalia" includes, without limitation, all equipment, products, and materials of any kind, whether useful for non-drug-related purposes or not, which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. Drug paraphernalia includes, but is not limited to, objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:
   a. Kits used, intended for use, or primarily designed for use in the planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance or unlawful drug can be derived.

b. Kits used, intended for use, or primarily designed for use in the manufacturing, compounding, converting, producing, processing, or preparing of unlawful drugs or controlled substance.
c. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is an unlawful drug or controlled substance.
d. Testing equipment used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of unlawful drugs or controlled substances.
e. Scales and balances used, intended for use, or designed for use in weighing or measuring unlawful drugs or controlled substances.
f. Diluents and adulterants, such as quinine hydrochloride, mannitol/mannite, dextrose, and lactose used, intended for use, or designed for use in cutting or thinning unlawful drugs or controlled substances.
g. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana or other controlled substance.
h. Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding unlawful drugs or a controlled substance.
i. Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of unlawful drugs.
j. Containers and other objects used, intended for use, or designed for use in storing or concealing unlawful drugs.
k. Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting unlawful drugs or controlled substances into the human body.
l. The phrase "designed primarily for" in subsection 4. of this Section means a device which has been fabricated, constructed, altered, adjusted, or marked especially for use in the smoking, ingestion, or consumption of marijuana, hashish, hashish oil, cocaine, or any other "controlled substance" and is peculiarly adapted to such purposes by virtue of a distinctive feature or combination of features associated with drug paraphernalia, notwithstanding the fact that it might also be possible to use such device for some other purpose. Such drug paraphernalia includes, but is not limited to, the following items or devices:
   (1) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes, with or without screens, permanent screens, hashish heads, or punctured metal bowls;
   (2) Water pipes;
   (3) Carburetion tubes and devices;
   (4) Smoking and carburetion masks;
   (5) Roach clips – meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand; whether the device is known as a "roach clip" or otherwise;
   (6) Miniature cocaine spoons, cocaine vials, or any spoon used, intended for use, or primarily designed for ingestion of a controlled substance;
   (7) Chamber pipes;
   (8) Carburetor pipes;

(9) Electric pipes;
(10) Air-driven pipes;
(11) Chillums;
(12) Bongs;
(13) Ice pipes or chillers;
(14) Wired cigarette papers;
(15) Cocaine freebase kits;
(16) A device constructed so as to prevent the escape of smoke into the air and to channel smoke into a chamber where it may be accumulated to permit inhalation or ingestion of larger quantities of smoke than would otherwise be possible, whether the device is known as a "bong" or otherwise;
(17) A device constructed so as to permit the simultaneous mixing and ingestion of smoke and nitrous oxide or other compressed gas, whether the device is known as a "buzz bomb" or otherwise;
(18) A canister, container, or other device with a tube, nozzle, or other similar arrangement attached thereto so constructed as to permit the forcing of smoke accumulated therein into the user's lungs, under pressure, whether the device is known as a "power hitter" or otherwise;
(19) A straw or tube for ingestion of a controlled substance through the nose or mouth; and
(20) A smokable pipe constructed with a receptacle or container in which water or other liquid may be placed into which smoke passes and is cooled in the process of being inhaled or ingested.

m. In determining whether an object is "drug paraphernalia," a court, hearing officer, or other authority may consider the following, in addition to the foregoing and all other logically relevant factors:
(1) Statement by an owner or by anyone in control of the object concerning its use;
(2) Proximity of the object to controlled substances;
(3) Existence of any residue of controlled substances on the object;
(4) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver to persons whom he or she knows, or reasonably should know, intend to use the object to facilitate a violation of the laws of the state of Washington or the United States relating to controlled substances;
(5) Descriptive materials or instructions, written or oral, accompanying the object, which explain or depict its use;
(6) National and local advertising concerning its use;
(7) The manner in which the object is displayed for sale, including its proximity to other objects falling within the definition of drug paraphernalia;
(8) The existence and scope of legitimate uses for the object in the community; and
(9) Expert testimony concerning its use, including testimony from law enforcement personnel regarding their knowledge and experience concerning its use.

F. "Manufacture" means to fabricate, make, produce, create, assemble, modify, adapt, or turn out.

G. "Patron" means a person who enters a business for the purpose of purchasing, or viewing as a shopper, merchandise offered for sale at the business.

H. "Person" means a natural person or any firm, partnership, association, corporation, or cooperative association.

(Ord. 2005-103 § 1 (part), 2006)

9.56.020 Illegal Conduct.

A. It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

B. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a misdemeanor.

(Ord. 2005-103 § 1 (part), 2006)

9.56.030 Remedies.

A. Any person who violates any provision of subsections A. and B., or who sells or gives, or permits to be sold or given, to any person any drug paraphernalia in any form commits a Class 1 Civil Infraction under Chapter 7.80 RCW and shall be punished accordingly, pursuant to Chapter 7.80 RCW and the infraction rules for courts of limited jurisdiction. It shall be no defense to a prosecution for an infraction issued under this subsection that the person acted, or was believed by the defendant to act, as agent or representative of another. Provided, that nothing in this Section prohibits legal distribution of injection syringe equipment through public health and community-based HIV prevention programs.

B. Any person 18 years of age or over who violates subsection A. of this Section by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a gross misdemeanor.

C. Any person who violates subsections A. or B., and has previously been found to have committed an infraction under either of those Sections within the most recent 24 month period shall be guilty of committing a misdemeanor. Upon conviction, said person shall be punished by a fine of not more than $1,000.00 and confinement of up to 90 days, or a combination of a fine and confinement.

(Ord. 2005-103 § 1 (part), 2006)

Appendix B

Tacoma Municipal Code
on
Drug Paraphernalia

Chapter 8.29

DRUG PARAPHERNALIA

Sections:

8.29.005 Enforcement priority.

The police chief and city attorney shall make the investigation, arrest, and prosecution of cannabis (a/k/a "marijuana") offenses the lowest enforcement priority, as this term may he defined in their policies and procedures manuals, for adult personal use. (City of Tacoma Initiative 1; General Election Nov. 8, 2011)

8.29.010 Findings.

The illegal use of controlled substances within the City creates serious social, medical, and law enforcement problems and constitutes a nuisance hazardous to the health and welfare of the citizens of the City. It causes serious physical and psychological damage to the youth of this community, impairs educational achievement and efficiency, increases non-drug-related crime, and threatens the ability of the community to ensure future generations of responsible and productive adults. The proliferation of the display of drug paraphernalia in stores within the City, and the manufacture, distribution, and sale of such paraphernalia, intensifies and otherwise compounds the problem of illegal use of controlled substances within this community. All of the foregoing is detrimental to the health, safety, and welfare of the citizens of Tacoma. (Ord. 27272 § 1; passed Oct. 5, 2004: Ord. 22182 § 1; passed Aug. 26, 1980)

8.29.020 Intent and purpose.

A. The City Council has been aware of and concerned about the general proliferation of establishments engaged in the sale of paraphernalia associated with drug use. In 1980, the City Council passed Ordinance No. 22182, regulating the display of drug paraphernalia to minors. However, the City Council now finds that the present ordinance has been ineffective and the continued proliferation of drug paraphernalia and illegal use of controlled substances by all persons, especially those under 18 years of age, requires further legislation on the subject.

B. The display of drug paraphernalia in stores within the City, and the distribution of such paraphernalia, intensifies and otherwise compounds the problem of illegal use of controlled substances within this community. A ban only upon the display and distribution of drug paraphernalia to persons under 18 years of age has not proven practical. A person who displays or distributes has difficulty determining who could lawfully view or receive drug paraphernalia.

C. The present ordinance creates an unnecessary enforcement burden by adding the age of a person who views or receives paraphernalia as an element of a prohibition upon display and distribution. A significant number of high school students are 18 years of age or older. It would be lawful to display and distribute paraphernalia to some students attending the same school in which the display or distribution to other students would be prohibited. Permitted display and distribution to adults within the community symbolizes a public tolerance of illegal drug use, making it difficult to explain the rationale of programs directed against similar abuse by youth. The problem of illegal consumption of controlled substances within this community is significant and substantial.

D. This chapter is a measure which is necessary in order to discourage the illegal use of controlled substances within the community. Therefore, it is the purpose and intent of the City Council to introduce this measure banning the manufacture, distribution, display, and sale of drug paraphernalia in order to discourage the illegal use of controlled substances within the City. (Ord. 27272 § 1; passed Oct. 5, 2004: Ord. 22182 § 1; passed Aug. 26, 1980)

8.29.030 Definitions.

A. As used in this chapter, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance as defined by chapter 69.50 RCW, possession of which is unlawful under chapter 69.50 RCW. It includes, but is not limited to:

1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

2. Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

3. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

4. Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of controlled substances;

5. Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances;

7. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

8. Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances;

9. Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

10. Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

11. Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

12. Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

b. Water pipes;

c. Carburetion tubes and devices;

d. Smoking and carburetion masks;

e. Roach clips: Meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

f. Miniature cocaine spoons, and cocaine vials;

g. Chamber pipes;

h. Carburetor pipes;

i. Electric pipes;

j. Air-driven pipes;

k. Chillums;

l. Bongs; and

m. Ice pipes or chillers.

B. In determining whether an object is drug paraphernalia under this section, a court or other authority should consider, in addition to all other logically relevant factors, the following:

1. Statements by an owner, or by anyone in control of the object, concerning its use;

2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;

3. The proximity of the object, in time and space, to a direct violation of chapter 69.50 RCW;

4. The proximity of the object to controlled substances;

5. The existence of any residue of controlled substances on the object;

6. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of chapter 69.50 RCW; the innocence of an owner, or of anyone in control of the object, as to a direct violation of chapter 69.50 RCW shall not prevent a finding that the object is intended or designed for use as drug paraphernalia;

7. Instructions, oral or written, provided with the object concerning its use;

8. Descriptive materials accompanying the object which explain or depict its use;

9. National and local advertising concerning its use;

10. The manner in which the object is displayed for sale;

11. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

13. The existence and scope of legitimate uses for the object in the community; and

14. Expert testimony concerning its use.

(Repealed and reenacted by Ord. 27639 Ex. A; passed Aug 28, 2007: Ord. 27357 § 1; passed May 10, 2005: Ord. 27272 § 1; passed Oct. 5, 2004: Ord. 22182 § 1; passed Aug. 26, 1980)

8.29.040 Display or sale – Revocation of business license. *Repealed by Ord. 27639.*

(Ord. 27639 Ex. A; passed Aug. 28, 2007: Ord. 27357 § 2; passed May 10, 2005: Ord. 27272 § 1; passed Oct. 5, 2004: Ord. 22182 § 1; passed Aug. 26, 1980)

8.29.050 Distribution – Revocation of business license. *Repealed by Ord. 27639.*

(Ord. 27639 Ex. A; passed Aug. 28, 2007: Ord. 27357 § 3; passed May 10, 2005: Ord. 27272 § 1; passed Oct. 5, 2004: Ord. 22182 § 1; passed Aug. 26, 1980)

8.29.060 Illegal conduct.

A. It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

B. It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

C. Any person 18 years of age or over who violates subsection B of this section by delivering drug paraphernalia to a person under 18 years of age who is at least three years his junior is guilty of a gross misdemeanor.

D. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a misdemeanor.

E. Every person who sells or gives, or permits to be sold or given to any person, any drug paraphernalia in any form commits a class I civil infraction under chapter 7.80 RCW. For purposes of this subsection, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing,

packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. Drug paraphernalia includes, but is not limited to, objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

1. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

2. Water pipes;

3. Carburetion tubes and devices;

4. Smoking and carburetion masks;

5. Roach clips: Meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

6. Miniature cocaine spoons and cocaine vials;

7. Chamber pipes;

8. Carburetor pipes;

9. Electric pipes;

10. Air-driven pipes;

11. Chillums;

12. Bongs; and

13. Ice pipes or chillers.

F. It shall be no defense to a prosecution for a violation of subsection E that the person acted, or was believed by the defendant to act, as agent or representative of another.

G. Nothing in subsection E of this section prohibits legal distribution of injection syringe equipment through public health and community-based HIV prevention programs, and pharmacies. (Ord. 27639 Ex. A; passed Aug. 28, 2007: Ord. 27357 § 4; passed May 10, 2005: Ord. 27272 § 1; passed Oct. 5, 2004: Ord. 22182 § 1; passed Aug. 25, 1980)

8.29.065 Illegal conduct. *Repealed by Ord. 27272.*

(Ord. 27272 § 1; passed Oct. 5, 2004: Ord. 24171 § 1; passed Aug. 23, 1988)

8.29.070 Violation – Penalty.

Violations of this chapter shall constitute a separate offense for each day upon which the violation occurs or is allowed to continue. Any person convicted of having violated a section of this chapter identified as a gross misdemeanor shall be punished by a fine of not more than $5,000 or a jail sentence of not more than one year, or both such fine and imprisonment. Any person convicted of having violated a section of this chapter identified as a misdemeanor shall be punished by a fine of not more than $1,000 or a jail sentence of not more than 90 days, or both such fine and imprisonment. Any person convicted of violating this chapter shall be subject to the minimum penalties set forth in RCW 69.50.425 as now enacted or subsequently amended. (Ord. 27626 Exhibit A; passed Jun. 19, 2007: Ord. 27272 § 1; passed Oct. 5. 2004: Ord. 22182 § 1; passed Aug. 25, 1980)

8.29.080 Revocation of Business License.

A. The purpose of this chapter is to protect the welfare, health, peace, and safety of the citizens of Tacoma by assuring that businesses within City boundaries conduct their business in a manner that does not promote or encourage the use of illegal drugs within the community.

1. Any license issued under Title 6 TMC may be suspended or revoked for any violation of this chapter by the licensee, or his or her agents or employees on the premises of the licensed business. For the purposes of this section, the term "premises" includes a vehicle.

2. Any license issued under Title 6 TMC may be suspended or revoked for any violation of this chapter by persons other than those listed in subsection (a) when the business owner or operator can reasonably control or prevent the violation.

3. Past violation of this chapter may be considered under Title 6 TMC in determining whether to issue a business license to any person.

4. The standard of proof for a violation is a preponderance of the evidence. It is not necessary for a person to be charged with or convicted of a crime for a violation to occur. Suspension or revocation of a license shall be in addition to any other remedy provided by law, including the penalty provisions applicable for violation of the terms and provisions of this chapter.

5. The procedures for suspending or revoking a license and any appeal of the suspension or revocation shall be in accordance with Title 6 TMC.

B. For a first violation of this chapter, the license of the owner shall be suspended for 30 days. During this 30-day period, the owner shall cease all activity related to that license. At the end of the 30-day period, the license may be reinstated, provided that the licensee refrains from violating this chapter or other provisions of law and complies with all other legal requirements. The 30-day period shall run from the date of suspension unless a timely appeal is filed. In the event a timely appeal is filed but ultimately denied, the 30-day period shall begin to run the day after all appellate remedies have been exhausted.

C. If a licensee engages in activity during any period of suspension or subsequently violates this chapter at any time after a first violation, the license shall be revoked for a period of one year. The one-year period shall run from the date of revocation unless a timely appeal is filed. In the event a timely appealed is filed but ultimately denied, the one-year period shall begin to run the day after all appellate remedies have been exhausted. The licensee shall not be eligible for any license from the City of Tacoma during this period. At the end of the one-year period, the licensee may apply for a new license, provided that the licensee complies with all requirements for such a license, posts a $50,000 performance bond, refrains from violating this chapter or other provisions of law, and complies with all other legal requirements. The performance bond must continue in effect for all periods during which the licensee conducts business or a licensed activity in the City of Tacoma. The performance bond shall be forfeited and the license permanently revoked should the licensee subsequently violate this chapter or other provisions of law.

D. Second revocation of license. If a license is revoked and a performance bond forfeited pursuant to Section C of this subsection, the licensee shall never be eligible for any license to conduct or manage any business or activity in the City of Tacoma.

E. The penalties set forth herein and throughout this chapter apply to the licensee or any business or entity in which the licensee has an ownership interest or membership, or in which the licensee has or has had influence or control. A licensee may not circumvent the provisions of this chapter by applying for a license in the name of a spouse, relative, or other person, or by using shell business entities. The Tax & License Division Manager may require any license applicant to provide such documentation as necessary to fully determine the true status of ownership, control, and finances of that business.

F. The remedies under this section shall be in addition to any other remedy provided by law, including the penalty provisions applicable for violation of the terms and provisions of this chapter. (Ord. 27639 Ex. A; passed Aug. 28, 2007: Ord. 27272 § 1; passed Oct. 5, 2004)

8.29.090 Nuisance or chronic nuisance. *Repealed by Ord. 27639.*

(Ord. 27639 Ex. A; passed Aug. 28, 2007: Ord. 27272 § 1; passed Oct. 5, 2004)

8.29.100 Exceptions.

This section shall not apply to:

(1) any person authorized by local, state, or federal law to manufacture, possess, or distribute such items, or

(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products. (Repealed and reenacted by Ord. 27639 Ex. A; passed Aug. 28, 2007: Ord. 27272 § 1; passed Oct. 5, 2004)

8.29.110 Seizure.

Any drug paraphernalia that was displayed, distributed, used, possessed, sold, or manufactured in violation of this section may be seized and, after a conviction for that violation, shall be forfeited, and upon forfeiture shall be disposed of pursuant to RCW 69 or any other applicable provision of law. (Ord. 27272 § 1; passed Oct. 5, 2004)

8.29.120 Severability.

If any provision or section of this chapter shall be held to be void or unconstitutional, all other parts, provisions, and sections of this chapter not expressly so held to be void or unconstitutional shall continue in full force and effect. (Ord. 27272 § 1; passed Oct. 5, 2004)

PIERCE COUNTY PROSECUTOR

February 13, 2012 - 3:42 PM

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